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97-6203

Supreme Court, U.S.
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No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATHANIEL JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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97-6203
Jones
v.
United States

QUESTIONS PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals violate petitioner's right to due process by sentencing him to a maximum term when he had no notice that he was facing such a term?

Was conduct attributed to petitioner in the trial sufficient evidence of a substantial effect on interstate commerce such that it would invoke Congress' authority under the Commerce Clause?

Did petitioner's conviction violate the Fifth Amendment prohibition against double jeopardy?

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No. _____

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OCTOBER TERM, 1997

NATHANIEL JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Nathaniel Jones respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered filed on June 27, 1997.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 27, 1997. The opinion affirmed the resentencing imposed by the district court. A copy of the opinion is attached to this petition as Appendix A.

The petitioner initially appealed his conviction and sentence to the Ninth Circuit upon conviction by jury. A copy of the Ninth Circuit published opinion, *United States v. Oliver*, 60 F.3d 547 (Ninth Cir. 1995), which affirmed in part and reversed in part, is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the NInth Circuit was entered on June 27, 1997. This petition for writ of certiorari follows within ninety days. 28 U.S.C. § 2101(c) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 13.1 and 13.4.

PROVISIONS OF LAW INVOLVED

1. Carjacking, 18 U.S.C. § 2119, provided in pertinent part (1992):

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -
>
> > (1) be fined under this title or imprisoned not more than 15 years, or both,

2. 18 U.S.C. § 924(c)(1) sets forth:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which the provides for an enhanced punishment if committed by the use of a deadly

> or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shogun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, each person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

3. CONSTITUTION OF THE UNITED STATES, ARTICLE [I] § 8, cl. 3, provides:

> The Congress shall have Power...
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

4. CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. PROCEDURAL BACKGROUND

Nathaniel Jones was charged with Carjacking, in violation of 18 U.S.C. § 2119, and Use of a Firearm During and In Relation to a Crime of Violence, in violation of 18 U.S.C. § 924 (c)(1). Jury trial was held July 27, 28, and 29, 1993. On July 29, 1993, Jones was found guilty of counts one and two of the indictment. On December 13, 1993, Jones was sentenced to a total term of imprisonment of 360 months. An appeal of the conviction and sentence was filed. In a published decision, *United States v. Oliver*, 60 F.3rd 547 (Ninth Cir. 1995), the Ninth Circuit affirmed the judgment of conviction. The sentence was vacated and the cause remanded for resentencing by the district court.

Upon resentencing, the court imposed a term of imprisonment of 240 months on count one and a term of sixty months on count two, to run consecutively.

An appeal was taken from this sentencing based on an improper upward departure by the district court. In a memorandum decision, the Ninth Circuit affirmed the conviction and sentence on June 27, 1997.

2. FACTUAL BACKGROUND

On December 7, 1992, petitioners Nathaniel Jones, Donovan Oliver (Oliver), and Darryl McMillan (McMillan) met at a get-together in Bakersfield. At about 9:45 p.m. they left together to get something to drink. The three men got into a blue Cadillac which Jones was driving. Shortly thereafter, McMillan and Jones exchanged seats so that

McMillan could drive as Jones was drunk and the car was swerving. A gun was in the backseat.

When the men arrived at Nagi Liquors, they pulled to the curb on the street near the side of the store and parked. Jones and Oliver exited the car. Ali Nassar Mutanna (Mutanna) and Abdullah Mardaie (Mardaie), Bakersfield residents, were parked in Mutanna's tan Honda also near the side of the store. The engine was running as they were speaking to a friend.

Mutanna saw two individuals exit the blue Cadillac and come towards him. One of them, later identified as Oliver, had a gun. Mutanna testified he was directed to exit the car, was pulled behind the store where Oliver held the gun on him and was robbed. Oliver directed Mutanna to lie down on the ground who then proceeded to kick and hit him. Jones was not in the area when this occurred. Immediately after this happened, Oliver left. Mutanna looked up from his prone position and saw Oliver get into the back seat of the Cadillac. Oliver fired a shot and the Cadillac drove off. As the Cadillac left only two individuals were in it -- the driver and Oliver in the backseat. At trial, Mutanna identified the driver as petitioner McMillan. Mutanna subsequently saw his tan Honda being driven away.

While Mutanna was behind the liquor store, Mardaie was still inside the tan Honda. He was directed outside by one of the men, robbed and told to get back in the car. He was in the car when the shot was fired.

After the Cadillac drove away, Jones got into the tan Honda and drove away. As Mardaie was still in the car, they traveled only a short distance, and Jones told him to leave the car which he did. Jones drove the vehicle away from Nagi's Liquors.

Mutanna flagged down a police officer and got in the backseat of the patrol vehicle. He directed the officers in the direction he saw the Jones travel. Blocks away Mutanna saw his tan Honda near the curb. He pointed this out to the officers, exited the patrol car, and the police then followed Jones who was still in the Honda. Jones made two right turns and hit a telephone pole where the car came to rest. He was arrested.

After a search of the surrounding area, police found the blue Cadillac parked at the curb of the street. An inventory search of the Cadillac yielded the gun used by Oliver. Oliver and McMillan were arrested nearby.

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

1. INTRODUCTION.

This court should grant review because the Court of Appeal's affirmance of the petitioner's conviction for carjacking on these facts would invalidate 18 U.S.C. § 2119 as the statute would have been enacted in excess of Congress' power to legislate under the Commerce Clause. The ruling by the Court of Appeals should be reviewed because it conflicts with this court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

Further, this court should grant review because the decision of the court of appeal is in violation of the Fifth Amendment prohibition against double jeopardy as well as a violation of petitioner's due process rights.

THE FAILURE BY THE GOVERNMENT TO PLEAD AND PROVE THE ALLEGATIONS OF SERIOUS BODILY INJURY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

The Due Process Clause of the Fourteenth Amendment requires that an individual accused may only be convicted upon proof beyond a reasonable doubt of each and every fact necessary to constitute the crime with which he is charged. *In Re Winship*, 397 U.S. 358, 90 S.Ct 1068 (1970) Elements are those items included in the definition of the offense. Whether or not a particular factor is an element of the offense charged or is instead only a sentencing provision is determined by looking at the statute itself. In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal petitioner. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979)

In late 1992, Congress enacted legislation making carjacking a federal offense by adding Section 2119 to the Title 18 of the United States Code. This provides in relevant part that,

"whoever, possessing a firearm ..., takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, ...

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both.

(3) if death results, be fined under this Title or imprisoned for any number of years up to life, or both.

The provisions of the carjacking statute provide for different maximum penalties and each has an additional element which must be proved by the prosecution. In a case where serious bodily injury is caused in the commission of a carjacking as set forth in section 2119 (2), the sentence maximum is 25 years, ten years more than the maximum for a carjacking without such injury. The injury which occurs as a result of the carjacking must be alleged and proven at trial in order for the 25 year maximum to apply. The injury includes: (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365 (g)(3).

Serious bodily injury is an element of the offense stated in section 2119(2). The fact of serious bodily injury increases the maximum penalty available for the crime by ten years. As an element, it must be pleaded and proven and the jury must make a determination that the injury occurred and falls within the statutory definition of "serious bodily injury. If such evidence is not presented at trial or if the jury does not find that serious bodily injury has occurred within the meaning of the statute, the prosecution has failed to meet its burden of proof. It then is limited to the 15 year maximum penalty set forth in subsection 1 of section 2119.

Crucial to the determination of the maximum penalty which the district court was entitled to impose is an examination of whether or not the serious bodily injury was an element of the offense or a sentencing factor. The leading case in this area is *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411 (1986). In *McMillan*, the court reviewed the constitutionality of a Pennsylvania statute authorizing a minimum five year sentence for anyone who was found to have visibly possessed a firearm in the commission of the offense. In the text of the law, the Pennsylvania legislature specifically provided that the statute be applied as a sentencing factor only. In its determination that the statute was properly a sentencing factor, the court relied on several indicia. The legislative definition and its intent to apply solely to sentencing were clearly set forth. The elements of the offenses McMillan was charged with did not change. The maximum penalties for those offenses were contained in separate statutes and were not affected by this provision. The major effect - to impose a minimum sentence in cases where the use of a handgun was visible - did not render the law unconstitutional. That fact alone did not negate the presumption of innocence or relieve the prosecution of the burden of proving the underlying crime, did not alter the maximum penalty available, nor create a separate offense calling for a separate penalty.

Petitioner Jones was charged by Indictment in Count One, "on or about December 7, 1992, in the County of Kern, State and Eastern District of California, while possessing a firearm, ... did take a motor vehicle, ... that had been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force, violence and intimidation, in violation of Title 18, United States Code,

§§ 2119 and 2." Count Two charged the Use of a Firearm During and In Relation to a Crime of Violence, to wit, Carjacking, in violation of 18 U.S.C. § 924(c)(1). There was no notice to the petitioner Nathaniel Jones in the indictment that serious bodily injury had occurred during the offense. At the time of arraignment, Jones was advised that he was facing a statutory maximum of fifteen years as to Count One and five years consecutive as to Count Two. In the discovery provided by the government, there was information that Mutanna had been hit on the side of his head, however, nothing to indicate that he had suffered a hearing loss or that his eardrum had been punctured at any time relevant to the carjacking. The Government's Trial Brief made no mention of serious bodily injury and in the trial itself, there was no indication that serious bodily injury within the meaning of 18 U.S.C. § 1365 had occurred. As a result of this lack of notice, Jones believed that injury was not involved in this case and that he would not have to litigate this issue. He did not request any medical reports of Mutanna prior to sentencing and did not make a request for medical examination of Mutanna at a point more recent to the injury.

The first notice petitioner Jones had that serious bodily injury had occurred was in the initial presentence investigation report. At that point, it was over a12 months after the offense and the physician who examined Mutanna was no longer in the area. As Jones was not on notice that injury was involved, he did not have a fair chance to litigate the issue either legally or factually. The failure to notify Jones prior to sentencing of the existence of serious bodily injury within the meaning of section 1365 violates the concepts of notice and fairness embodied in the due process clause.

Further, the jury did not make a determination that the injury which occurred was serious bodily injury as set forth in Title 18. There was no evidence of injury and the jury was never instructed to find that they needed to determine if serious bodily injury had occurred within the meaning of the statute.

It is clear that Nathaniel Jones was convicted by the jury solely of carjacking as defined in section 2119 (1). The indictment charged Jones with carjacking, nothing else. The applicable statute as well as constitutional standards dictate that the government plead and prove any serious bodily injury beyond a reasonable doubt. Because the government did not, Jones was subject only to a maximum penalty of 15 years. The district court then, erroneously sentenced Jones to the maximum twenty-five year sentence provided for in subsection (2) which determination was affirmed by the Ninth Circuit. As this determination was in violation of due process safeguards afforded to petitioner by the U.S. Constitution, his sentence cannot stand.

THE CONDUCT OF THE PETITIONER IS INSUFFICIENT TO BRING HIS CONDUCT WITHIN THE MEANING OF 18 U.S.C. § 2119, OTHERWISE THE STATUTE WOULD BE AN INVALID EXERCISE CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

The Constitution states "the Congress shall have the power. . . to regulate commerce with foreign nations, and among the several states, and with the Indian nations. U.S. Const. Art. I, § 8. The Courts have interpreted this clause as conferring substantial power on Congress to regulate interstate commerce. However, the Supreme Court recently stressed that the Commerce Clause does not obliterate the distinctions between federal and state power. *United States v. Lopez*, 514 U.S. 549,

115 S.Ct. 1624, 131 L.Fd.2d 626 (1995). In *United States v. Lopez*, this Court addressed a challenge to Congress' authority under the Commerce Clause. The Court conceded that prior cases advanced a broad interpretation of the Commerce Clause, but added that the commerce authority must be subject to stricter review when such regulation impinges on traditional state powers. Specifically, the Supreme Court wrote:

> But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. at 1628-1629.

The Court then divided Congress' commerce power into three general categories.

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. . .

Id. at 1629 (citations omitted).

The Court concluded that in determining the legality of a statute which seeks to regulate an activity which is not directly connected to interstate commerce or is purely intrastate in nature, that activity must substantially affect interstate commerce.

> Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. Within this

> final category, admittedly, our case law has not been clear whether an activity must affect or substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce.

115 S. Ct. at 1629-1630.

In order for the government to obtain a conviction at trial for the crime of carjacking under 18 U.S.C. § 2119 they must establish as an essential element of that crime that the motor vehicle "has been transported, shipped, or received in interstate or foreign commerce". This element must be proved to the jury beyond a reasonable doubt. Here the government's theory to establish this element was that the motor vehicle was transported in interstate commerce after manufacture. To answer the question about whether this evidence is sufficient to sustain a conviction for carjacking in federal court this court must first answer the question whether Congress could constitutionally prohibit the taking of motor vehicles that at any time crossed a state line under the power vested in it by the Commerce Clause to regulate commerce .. among the several States.

In *Lopez*, this court identified three broad categories of activity that Congress may regulate under its commerce power. *Lopez*, *supra* at 1629 These categories are: 1) The channels of interstate commerce; 2) instrumentalities of interstate commerce; 3) activities having a substantial affect on interstate commerce.

The motor vehicle in this case was a private vehicle that was not engaged in or used in interstate commerce. The government must rely on the Congress's power to

regulate intrastate activities that "substantially effect" interstate commerce. *United States v. Lopez*, *supra* at 1630. It is hard to understand how driving a car less than a mile which has previously been shipped over a state line has any effect on interstate commerce, let alone a substantial effect. Just as the Court in *Lopez* invalidated the Gun Free School Zones Act because it contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce *United States v. Lopez, supra* at 1631, to read the statute here broadly would completely eliminate any such required jurisdictional element. If the statute is read this in such a broad manner, there is no jurisdictional element to assure the required "substantial effect" on interstate commerce and the statute would be unconstitutional as beyond the power of the Congress to enact under the Commerce Clause. Therefore, this court should require a finding of a substantial effect on interstate commerce before a conviction of carjacking will be sustained. Since the facts of this case lack any such nexus to interstate commerce, the evidence was insufficient to support the conviction and it should be reversed.

THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION OF FEDERAL LAW WHETHER IT IS DOUBLE JEOPARDY FOR A CRIMINAL PETITIONER TO BE SENTENCED TO A TERM OF IMPRISONMENT FOR CARJACKING AS WELL AS A CONSECUTIVE TERM FOR USE OF A FIREARM DURING THE CARJACKING, WHERE THE USE OF THE FIREARM IS AN ESSENTIAL PART OF THE UNDERLYING OFFENSE.

The rule of lenity prohibits the government from convicting and punishing a petitioner more than once for conduct arising from the same transaction absent congressional intent to the contrary. In those cases where congressional intent is not

clear or is lacking, the rule of lenity requires that doubts be resolved against turning a single transaction into multiple offenses. *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) Ambiguities in the law are to be resolved in favor of lenity. *United States v. Sanchez-Vargas*, 878 F.2d 1163 (9th Cir. 1989)

In determining whether or not the same act or transaction constitutes a violation of two different statutory provisions is whether each provision requires proof of an additional fact which the other does not. *United States v. Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) The assumption is that Congress does not usually intend to punish the same offense under two distinct statutes and in those circumstances there the *Blockburger* test fails, there can be no cumulative punishments in the absence of clear legislative intent. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432 (1980)

The crime of armed carjacking went into effect in October 1992. The offense which provides enhanced penalties for armed auto robberies was enacted as Congress sought to control the theft of vehicles at gun-point because of its growing threat to human life and the economic well-being of the Nation. Pub.L.No. 102-519, § 2119, note (b), (October 25, 1992); 106 Stat. 3384. The legislative history of the AntiCar Theft Act of 1992 by its title and subtitle specifically state that the penalties for vehicle theft are being enhanced by the creation of the federal offense. That Congress intended to impose a stiff sentence upon a person who commits a violent felony while in possession of a gun is clear, however, the legislative history is silent as to cumulative

punishments for the use of the same firearm and the enhancements contained in the provisions of 18 U.S.C. § 924(c).

Jones' conviction and punishment for carjacking and the use of a firearm during and in relation to a crime of violence fails the test enunciated in *Blockburger*. The underlying felony of carjacking requires that the individual possess a firearm in committing the offense. At the time that this offense was committed, in those instances where a vehicle is taken by force or intimidation from the person of another but without a firearm, that individual could not be found guilty of carjacking. As the possession of a firearm is a necessary element of the offense, under the principles set forth in *Whalen*, Jones convicted and sentenced for carjacking cannot also be charged and convicted of a violation of 18 U.S.C. § 924(c)(1), an element of that same carjacking offense. To construe the statutes as allowing the gun count to be stacked, would in essence stack one gun count on another. Such a result is a violation of the prohibition against double jeopardy.

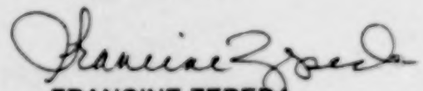
CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the Ninth Circuit be granted.

DATED: September 25, 1997

Respectfully submitted,

QUIN DENVIR
Federal Defender



FRANCINE ZEPEDA
Assistant Federal Defender
Attorney for Petitioner
Nathaniel Jones

APPENDIX A

(Cite as: 116 F.3d 1487, 1997 WL 355922 (9th Cir.(Cal.)))

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Donovan Dwayne OLIVER; Darryl Lee McMILLAN; Nathaniel JONES, Defendant-Appellants.

Nos. 96-10176, 96-10177, 96-10179.

United States Court of Appeals, Ninth Circuit.

Submitted April 21, 1997 [FN**]

FN** The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

Decided June 27, 1997.

Appeal from the United States District Court for the Eastern District of California; No. CR-92-05264-REC; Robert E. Coyle, District Judge, Presiding

Before: HUG, Chief Judge, CANBY and HAWKINS, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Donovan Oliver, Darryl McMillan, and Nathaniel Jones appeal their sentences imposed on resentencing following their convictions for carjacking in violation of 18 U.S.C. § 2119 and for use of a firearm in violation of 18 U.S.C. § 924(c). In a prior appeal, we affirmed defendants' convictions but remanded for resentencing. We now affirm their sentences.

The district court was not required to identify an independent basis for its departures when it resentenced defendants to the maximum sentence allowed--300 months. Both our earlier opinion in this case, United States v. Oliver, 60 F.3d 547, 556 (9th Cir.1995), and U.S.S.G. § 2K2.4 itself, make clear that the district court could rely on this guideline alone to depart upward. Furthermore, the upward departures here were not unreasonable because defendants were sentenced at the top of the guideline ranges that would result absent the § 924(c) convictions.

We also find no merit in Oliver's and McMillan's contention that the district court violated the Ex Post Facto Clause by using the 1993 Guidelines in effect at the time of sentencing, rather than the 1992 Guidelines in effect at the time of their offenses. The Ex Post Facto Clause is violated when a guideline change (1) applies to events before its enactment, and (2) disadvantages the defendant. United States v. Carson, 988 F.2d 80, 81-82 (9th Cir.1993). No such violation occurred here, however, because as the government correctly notes, the 1993 Guidelines are actually more favorable to defendants. Under the 1992 Guidelines, the district court would have had to apply a seven-level enhancement for discharge of a firearm. U.S.S.G. § 2B3.1(b)(2)(A) (1992). The 1993 Guidelines, by contrast, forbid such an enhancement under these circumstances, instead authorizing a district court to depart upward to correct any injustice. Even after accounting for the two-point enhancement for carjacking under the 1993 Guidelines, U.S.S.G. § 2B3.1(b)(1)(B), therefore, defendants' guideline ranges were lower under the 1993 version. Moreover, the upward departure provision did not prejudice the defendants because the district judge made clear that under either set of Guidelines he would sentence the defendants to the 300 months that our remand imposed as an upper limit.

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APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DONOVAN DWAYNE OLIVER; DARRYL LEE MCMILLAN; NATHANIEL JONES, *Defendants-Appellants.*	Nos. 93-10770 93-10775 93-10779 D.C. No. CR-92-05264-REC OPINION

Appeals from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
December 12, 1994*—San Francisco, California

Filed July 6, 1995

Before: Procter Hug, Jr., William C. Canby, Jr.
and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals affirmed judgments of conviction in part, vacated in part, and remanded. The court held that in enacting the federal carjacking statute, Congress did not

*Submitted on the briefs as to No. 93-10775.

exceed its authority under the Commerce Clause. The court also held that the appellants' sentences were incorrectly subjected to a seven-level upward departure based on the use of a firearm in the carjacking.

Appellants Donovan Oliver, Darryl McMillan, and Nathaniel Jones approached two persons sitting in a parked car in a parking lot. They ordered the victims out of the car at gunpoint. Oliver stuck the barrel of his firearm into one victim's ear, causing a perforated eardrum, which resulted in numbness and hearing loss. The appellants searched the victim's pockets and then stole their car, forcing one victim to accompany Jones in the stolen car. That victim was released a short distance later. The appellants were arrested a short time later after Jones crashed the stolen car during a chase with police.

The appellants were indicted on one count of carjacking/aiding and abetting and one count of using a firearm during a crime of violence/aiding and abetting. A jury convicted the appellants on all counts. The appellants were each sentenced under the 25-year (300 month) statutory maximum on the carjacking count, because one victim suffered serious bodily injury during the crime. They were also sentenced to a consecutive term of 60 months for the use of a firearm. The appellants all appealed their sentences and convictions.

[1] In enacting the carjacking statute, Congress did not exceed its authority under the Commerce Clause, because carjacking and cars are sufficiently related to interstate commerce. [2] A recent Supreme Court case holding that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of school did not alter the court of appeals' view.

[3] The government is not required to prove that a defendant actually possessed a firearm in order to convict a person for carjacking under an aiding and abetting theory. A conviction only requires evidence that a defendant knew that a co-defendant had and intended to use a firearm during a carjacking, and intended to aid in that endeavor.

[4] Although carjacking is a general intent crime, and voluntary intoxication is not a defense to a general intent crime, evidence of drug intoxication that related to the defendant's sanity during the time of the offense is admissible. [5] However, the district court did not abuse its discretion in refusing to allow Oliver to present evidence of his voluntary intoxication because Oliver did not present an insanity defense, and the proffered testimony that he drank heavily on the day of the carjacking would not necessarily show that he was incapable of committing the crime charge or appreciating the wrongfulness of his acts.

[6] "Serious bodily injury" was a factor that the district court was free to consider in sentencing the appellants, even though the defendants did not become aware until the sentencing phase that there would be a contention that the case involved serious bodily injury for the purposes of determining the appropriate sentence under the carjacking statute. [7] The separate provisions in the carjacking statute for different sentences, based on whether serious bodily injury or death results, exist for sentence enhancement purposes and are not elements of separate offenses. [8] The carjacking statute sets forth one offense, with several possible penalties.

[9] While the appellants were not informed through the indictment or at the arraignment that they were facing a 25-year maximum sentence based on the possible presence of "serious bodily injury," this omission did not amount to a due process violation. The evidence at trial suggested that the victim suffered injury. The presentence report mentioned the victim's injuries, and the appellants were given medical reports on his condition. The appellants were given an opportunity to contest the issue at sentencing.

[10] The Sentencing Guidelines provide for a four-level increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." [11] The district court's conclusion that the abduction of one victim facilitated the appellants' escape was not clear error because the evidence showed that Jones forced the victim to accompany him as he drove the stolen car away from the crime scene. The evidence supported the conclusion that the abduction made a quicker get-away possible and prevented the victim from crying out or calling the police. [12] Oliver's sentence should be remanded because, although the district court retracted its initial obstruction of justice enhancement for Oliver, it did not recalculate his sentence without the two-level enhancement for allegedly testifying untruthfully at trial.

[13] Pursuant to the Sentencing Guidelines, a seven-level enhancement would normally have been applicable to the appellants' carjacking sentences because a gun was discharged during the offense. However, because the appellants were also convicted of using a firearm during a crime of violence, which carries a mandatory consecutive five year sentence, the appellants' carjacking sentences were not subject to the seven-level enhancement. [14] The maximum combined penalty for the underlying carjacking conviction plus the conviction for using a firearm during a crime of violence could not exceed the maximum penalty available for the carjacking with the seven-level enhancement.

COUNSEL

Anthony P. Capozzi, Fresno, California, for defendant-appellant Oliver; Richard G. Cenci, Fresno, California, for defendant-appellant McMillan (on the briefs); and Francine Zepeda, Assistant Federal Public Defender, Fresno, California, for defendant-appellant Jones.

Patrick Hanley, Assistant United States Attorney, Fresno, California, for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

Defendants Donovan Dwayne Oliver, Darryl Lee McMillan, and Nathaniel Jones appeal their convictions and sentences for carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

I.

Background

The evidence at trial disclosed the following facts: On December 7, 1992, Oliver, Jones and McMillan drove to a liquor store in Bakersfield, California. In the liquor store parking lot, they approached Ali Nassar Mutanna and Abdullah Mardaie, who were in Mardaie's parked car. After ordering Mutanna and Mardaie out of the car, Oliver held them at gunpoint. Oliver stuck the barrel of his firearm into Mutanna's left ear and held it there to ensure that Mutanna would not move, causing Mutanna's ear to bleed profusely. Meanwhile, Jones and McMillan searched Mutanna's and Mardaie's pockets. Oliver then forced Mutanna behind the liquor store, ordered him to lie on the ground, and struck him in the head while he was lying there. Oliver told Mutanna that Oliver would kill him if he moved. Oliver then got into Jones' car, which was being driven by McMillan, and fired a shot as they drove away.

Jones had forced Mardaie into Mutanna's car, and Jones followed Oliver and McMillan as they left the scene. After they travelled a short distance, Jones ordered Mardaie out of the car.

After defendants left, Mutanna flagged down a police car. Police officers located Mutanna's car a few blocks away from the liquor store. Jones fled in Mutanna's car when he noticed the police car approaching. After a short car chase, Jones crashed Mutanna's car and was apprehended. Jones' car was also located nearby, with the gun used by Oliver in the back seat. Oliver and McMillan were arrested shortly thereafter.

Defendants were indicted on December 30, 1992, with one count of carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and one count of using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). On July 29, 1993, defendants were convicted by a jury on all counts. Defendants were sentenced under the 25-year (300 months) statutory maximum set forth in § 2119(2), because Mutanna suffered serious bodily injury during the crime. Defendants were each sentenced to a total of 300 months on the carjacking count and a consecutive 60 months for the use of a weapon.

Defendants timely appealed their sentences and convictions on December 17, 1993.

II.

Grand Jury Indictment

Defendants Oliver and McMillan first argue that the district court lacked jurisdiction because the indictment against them was returned in a courtroom closed to the public. *See* Rule 6(f), Fed. R. Crim. P. ("indictment[s] shall be returned by the grand jury to a federal magistrate in open court"). "[E]rrors in the grand jury indictment procedure are subject to harmless

error analysis unless 'the structural protections of the grand jury have been compromised as to render the proceedings fundamentally unfair.' " *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-57 (1988)). Because defendants do not claim prejudice as a result of the indictment being returned in a closed courtroom, any defect was harmless. In any event, defendants did not raise this issue before the district court, so they waived the right to raise the issue on appeal. *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (objection based upon the failure to return an indictment in open court is not jurisdictional and is waived if not raised prior to trial); Rule 12(b)(1), Fed. R. Crim. P.

III.

Commerce Clause

[1] Defendants contend that Congress exceeded its power under the Commerce Clause in enacting the carjacking statute, because carjacking is not sufficiently related to interstate commerce. We recently rejected this argument in *United States v. Martinez*, 49 F.3d 1398, 1400-01 (9th Cir. 1995). In so ruling, we joined with every other circuit court that had addressed the question.

[2] The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not alter our view. In *Lopez*, the Supreme Court held that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of a school. *See* 18 U.S.C. § 924(q). The Court noted that "§ 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631. It also explained that the statute does not seek to protect "an instrumentality of interstate commerce." *Id.* at 1630. Finally, the Court pointed out that there was no showing of a substan-

tial effect of the prohibited activity on interstate commerce, and Congress had made no findings that there was such an effect. *Id.* at 1631-32.

The carjacking statute has a very different background. First, it applies only to the forcible taking of a car "that has been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. § 2119. *See United States v. Hanna*, No. 94-10131, Slip Op. at 5965-66 & n. 2 (9th Cir., May 31, 1995) (holding that "[18 U.S.C. § 922(g)'s] requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause"). Second, cars are themselves instrumentalities of commerce, which Congress may protect. *See United States v. Watson*, 815 F. Supp. 827, 831 (E.D. Pa. 1993) (citing *United States v. Perez*, 402 U.S. 146, 150 (1971), and upholding § 2119 under the Commerce Clause because it protects an instrumentality of commerce).

Lastly, we note that Congress was not silent regarding the effect of carjacking on interstate commerce. As we stated in *Martinez*, Congress relied on, among other things, "the emergence of carjacking as a 'high-growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad, or selling cars to 'chop shops' to distribute various auto parts for sale." *Martinez*, 49 F.3d at 1400 n.2 (citing legislative history). That Congress was addressing economic evils of an interstate nature differentiates the carjacking statute from the firearms statute invalidated in *Lopez*. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 115 S. Ct. at 1634. Carjacking, on the other hand, is exactly that sort of economic activity, as Congress clearly concluded. We accept that conclusion, and accordingly reject the defendants' contention.

IV.

Equal Protection

Having complained that carjacking does not impact interstate commerce, defendants Oliver and McMillan next argue that the carjacking statute violates equal protection because it only prohibits the theft of cars previously "transported, shipped, or received" in interstate commerce, and does not prohibit the theft of cars that have not been "transported, shipped or received" in interstate commerce. Because defendants did not raise this issue before the district court, we decline to address it on appeal. *See United States v. Cupa-Guillen*, 34 F.3d 860, 863-64 (9th Cir. 1994) (failure to present equal protection challenge to district court constitutes waiver of the claim).

V.

Double Jeopardy

Defendants contend that their convictions under § 2119 and § 924(c) violate the Double Jeopardy Clause because both statutes punish the same conduct. This argument is also foreclosed by our recent opinion in *United States v. Martinez*, 49 F.3d at 1402.

VI.

Sufficiency of Evidence

Defendant Jones argues that there was insufficient evidence to support his carjacking conviction under the aiding and abetting theory. Although Jones moved for judgment of acquittal at the close of the government's case, he did not renew the motion at the close of all evidence. We therefore review for plain error. *United States v. Ramirez*, 880 F.2d 236, 238 (9th Cir. 1989).

Relying on *United States v. Dinkane*, 17 F.3d 1192 (9th Cir. 1992), Jones contends that he was not properly convicted of carjacking because there was no evidence that he possessed a firearm. *Dinkane* involved a conviction for armed bank robbery under 18 U.S.C. § 2113(d), an aggravated form of bank robbery under 18 U.S.C. § 2113(a). We noted that to sustain a § 2113(d) conviction for an aider and abettor, the government must show not only that the defendant knowingly and intentionally aided the act of bank robbery, but also the commission of the aggravating element. *Id.* at 1197. We therefore concluded that the defendant get-away driver could not be convicted of armed bank robbery under an aiding and abetting theory where there was no evidence that he knew — before or during the bank robbery — that the robbers had and intended to use weapons. *Id.* at 1198.

[3] Contrary to Jones' contention, *Dikane* does not require that the government prove that he actually possessed the firearm. *Dikane* only requires proof that Jones knew that a co-defendant had and intended to use the firearm during a carjacking, and intended to aid in that endeavor. There was ample evidence of this.

The evidence demonstrated that, on the evening of the carjacking, Jones, Oliver and McMillan drove to a liquor store in Jones' car. Oliver testified that when he got into Jones' car, he noticed a gun on the floor of the back seat. Mutanna testified that when defendants approached him in the liquor store parking lot, he could see that Oliver was carrying a gun. Oliver held Mutanna and Mardaie at gunpoint, while Jones and McMillan rifled their pockets. Oliver also used his gun to keep Mutanna behind the store, and fired a shot from Jones' car, as Jones escaped in the Mutanna's car. A reasonable jury could have easily concluded from these facts that Jones knew Oliver had a firearm, that Jones knew Oliver intended to use the firearm during the carjacking, and that Jones intended to and did aid in that endeavor. Jones' conviction was not plain error.

VII.

Voluntary Intoxication Evidence

Defendant Oliver takes issue with the district court's refusal to allow evidence of his voluntary intoxication. We review the exclusion of evidence for abuse of discretion. *United States v. Rahm*, 996 F. 2d 1405, 1410 (9th Cir. 1993).

[4] As the district court correctly concluded, carjacking is a general intent crime, *Martinez*, 49 F.3d at 1401, and voluntary intoxication is not a defense to general intent crimes, *see, e.g., United States v. Sneezer*, 983 F.2d 920, 922 (9th Cir. 1992) (voluntary intoxication may be a defense to a specific intent crime, but is not a defense to a general intent crime). Nevertheless, Oliver argues that *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975), requires that he be allowed to present the evidence. In *Hartfield*, we held that evidence of drug intoxication was admissible because it related to the defendant's sanity during the time of the offense. *Id.* at 259-60.

[5] *Hartfield* is not applicable to this case. First, Oliver did not present an insanity defense. Moreover, unlike the proffered testimony in *Hartfield*, Oliver's testimony would only show that he drank heavily on the day of the carjacking. This would not necessarily show that Oliver was incapable of committing the crime charged or appreciating the wrongfulness of his acts. Accordingly, we find no abuse of discretion in the district court's refusal to allow evidence of Oliver's voluntary intoxication.

VIII.

Serious Bodily Injury

[6] Defendants also argue that "serious bodily injury" as set forth in § 2119(2) is an element of the carjacking offense

which must be pleaded in the indictment and proved beyond a reasonable doubt at trial. Defendants point out that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury for purposes of § 2119(2). The district court concluded that serious bodily injury is a factor which it was free to consider in sentencing defendants. We agree with the district court.

The Supreme Court has emphasized that the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). We therefore must look to the plain language and structure of the statute. *United States v. Young*, 936 F.2d 1050, 1054 (9th Cir. 1991). The carjacking statute, 18 U.S.C. § 2119, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall —
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> (1) be fined under this title or imprisoned not more than 15 years, or both,
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> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined not more than 25 years, or both, and
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> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

[7] In *United States v. Williams*, ___ F.3d ___, 1995 WL 236715, * 7 (11th Cir. 1995), the Eleventh Circuit concluded

that "Congress[ ] inten[ded] that subparagraphs (2) and (3) be treated as sentencing enhancement features, and not elements of the offense." According to the Eleventh Circuit, the natural reading of the text — in which the crime of carjacking is defined in the first paragraph and the subparagraphs simply set forth different degrees of sentencing — suggests that the subparagraphs are sentencing provisions. *Id.* We agree with the Eleventh Circuit and conclude that the serious bodily injury and death language in § 2119 exist for sentence enhancement purposes. *See also United States v. Ryan*, 9 F.3d 660, 669 (8th Cir. 1993), *modified on other grounds*, 41 F.3d 361 (8th Cir. 1994) (en banc) (concluding that "if death results" provision of federal arson statute, 18 U.S.C. § 844(i), is sentencing enhancer), *cert. denied*, ___ S.Ct. ___, 1995 WL 50599 (1995); *United States v. Patterson*, 38 F.3d 139, 143-44 (4th Cir. 1994) (concluding that "if death or serious bodily injury results" language in 21 U.S.C. § 841(b) (1)(C) is sentencing enhancement), *cert. denied*, ___ S.Ct. ___, 1995 WL 50065 (1995). The plain text of the statute establishes one offense, as defined in the first main paragraph. That definition of the offense is set apart by a comma, followed by the word "shall" and then three sentencing possibilities. This does not establish three separate, substantive offenses.

Our decision in *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), is instructive. In that case, we determined that the weapon provision of 18 U.S.C. § 111 is a sentencing factor, rather than an element of the crime of assaulting a federal officer. The statute under which the defendant was convicted read as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three (3) years, or both.

> Whoever, in the commission of such acts uses a deadly or dangerous weapon shall be fined not more than ten (10) years, or both.

18 U.S.C. § 111 (amended 1988). In concluding that Congress intended the weapon provision to be a sentencing factor, we noted that it was not "structurally separated from the rest of the section, indicating that the section contains only one substantive offense." *Young*, 936 F.2d at 1054. Moreover, the "weapon provision [was] not drafted as a stand-alone offense; it incorporate[d] the predicate acts by reference rather than affirmatively setting forth any specific elements." *Id.*; *see also Ryan*, 9 F.3d at 667 (use of semi-colons and the conjunction "and," as well as conclusion that latter sections of arson statute regarding resulting bodily injury and death could not stand alone, suggest treatment as a single offense).

[8] Similarly, Congress did not enact § 2119 and its subparts in "structurally separate" provisions. It did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph. These factors lead to the conclusion that § 2119 sets forth one offense, with several possible penalties.

Defendants argue that *Young* is distinguishable because, in a subsequent amendment, the weapon provision of § 111 was specifically labelled "Enhanced Penalty," and therefore Congressional intent is clear. It is true that in *Young* we found this subsequent amendment to have "persuasive value." *Young*, 936 F.2d at 1054.[1] But we have similar persuasive evidence of congressional intent in this case. Section 2119 was adopted as part of the overall "Anti-Car Theft Act of 1992" (the "Act"), enacted at a time when carjacking crimes were increasing at an alarming rate. *See* Public Law 102-519, 102d

[1]Although we recognized that "the view of a later Congress does not establish definitely the meaning of an earlier enactment." *Id.*

Congress, 106 STAT 3384 (1992). In the Act, § 2119 and its subparagraphs come directly under the title, "Tougher Law Enforcement Against Auto Theft," and the subtitle, "*Enhanced Penalties* for Auto Theft." *Id.* (emphasis added). Clearly the title, and undoubtedly the subtitle, suggest an intent that § 2119 set forth enhanced penalties. Other portions of the legislative history suggest the same conclusion. *See, e.g.*, H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 14, *reprinted in*, 1992 U.S.C.C.A.N. 2847 ("the Committee adopted an amendment . . . increasing the maximum prison term for carjacking to 25 years, instead of 15 years . . . when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine."); H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 30, 1992 U.S.C.C.A.N. 2863 ("H.R. 4542 also would provide for new and enhanced penalties (including fines) for certain crimes, including armed robberies of motor vehicles . . ."); H.R. Rep. No. 102-851 (II), 102nd Cong., 2d. Sess. 61, 1992 U.S.C.C.A.N. 2894 ("The Committee's substitute also increased the penalty for 'carjackings' when serious bodily injury occurs over and above the penalties in the bill reported by the Judiciary Committee."). In fact, nothing in our review of the Act or its legislative history even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt at trial.

We also reject defendants' contention that the carjacking statute is similar to the statute construed in *United States v. Gonzales-Medina*, 976 F.2d 570 (9th Cir. 1992). In *Gonzales-Medina*, we concluded that the provisions of 8 U.S.C. § 1326,[2]

[2]The statute provides in relevant part:

> (a) Subject to subsection (b) of this section, any alien who—
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> (1) has been arrested and deported or excluded and deported, and thereafter
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> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at

dealing with the deportation of aliens, comprised two separate crimes, with separate elements. Unlike the subparagraphs of the carjacking statute, § 1326 (a) and (b) stand alone, each with its own elements and sentence provisions. Subsection (a) states that it is "subject to subsection (b);" while subsection (b) contains the language "[n]otwithstanding subsection (a)." The structure and language of § 1326 is very different from that of the carjacking statute; *Gonzales-Medina* is not controlling.

[9] While defendants were not informed through the indictment or at arraignment that they were facing the 25-year maximum, this omission does not amount to a due process violation. *See, e.g., Young*, 936 F.2d at 1053 (indictment need not plead sentencing factor); *Lamere v. Risley*, 827 F.2d 622, 624 (9th Cir. 1987) (notice in the information that government will seek sentence enhancement not necessary); *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir.) (prior violent felonies used for sentence enhancement need not be charged in indict-

a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisonment not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection —

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 15 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 15 years, or both.

ment or proved at trial), *cert. denied*, 502 U.S. 950 (1991). The evidence at trial suggested that Mutanna suffered injury. The probation department reported in the presentence report that Mutanna suffered a perforated eardrum, causing numbness and some hearing loss, and defendants were given medical reports on the condition. Defendants concede that they were given an opportunity to contest the issue at sentencing. We note that defendants have never demonstrated that the information in the presentence report was inaccurate, or that the district court erred in determining that Mutanna suffered serious bodily injury. Having concluded that serious bodily injury is not an element of the offense, we are compelled to find that defendants received sufficient process for purposes of the Fifth Amendment. *See, e.g., West*, 826 F.2d at 912 (due process satisfied where prior convictions used for sentence enhancement were detailed in presentence report, defendant did not challenge prior convictions, and defendant did not show information in presentence report was materially false); *United States v. McDougherty*, 920 F.2d 569, 575 (9th Cir. 1990) (due process satisfied where sentencing enhancement factors are alleged in presentence report and proven by a preponderance of evidence), *cert. denied*, 499 U.S. 911 (1991).

IX.

Sentencing Guideline Issues

Defendants contend that the district court committed various sentencing errors. We review the district court's interpretation and application of the United States Sentencing Guidelines ("U.S.S.G.") de novo, while we review the district court's factual findings in the sentencing phase for clear error. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994).

A. Abuction

[10] In sentencing defendants, the district court applied U.S.S.G. § 2B3.1(b)(4)(A), which provides for a four-level

increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." "Abducted" is defined as "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1. Defendants argue that although Mardaie was in the stolen car when Jones drove it away, there was no indication that this facilitated either the offense or the escape. We disagree.

[11] There can be no dispute that Mardaie was forced to accompany Jones as he drove the stolen car away from the crime scene. Jones followed Oliver and McMillan, who left the scene in Jones' car. The evidence easily supports the conclusion that the abduction made a quicker get-away possible and prevented Mardaie from crying out or calling the police. Furthermore, on this record, it is entirely possible that Jones thought he was taking the only living witness away from the crime. The district court's conclusion that Mardaie's abduction facilitated defendants' escape was not clear error.[3]

We also reject Oliver's and McMillan's suggestion that the district court failed to make the requisite findings regarding their role in the abduction under U.S.S.G. § 1B1.3. That section provides that a defendant may be accountable for the conduct of others that was "in furtherance of the jointly undertaken criminal activity" and "reasonably forseeable in connection with that criminal activity." *See* U.S.S.G. § 1B1.3, comment. (n. 2). We think it is obvious from the district court's rulings that he found the abduction to be in furtherance of the carjacking and foreseeable to defendants. And, as the discussion above demonstrates, this conclusion was fully supported by the evidence. *See United States v. Slater*, 971

[3]The district court also concluded that Mardaie's abduction facilitated the offense. Because the district court soundly concluded that the abduction facilitated defendants' escape, we need not reach that issue. *See United States v. Hernandez-Valenzuela*, 932 F.2d 803, 805 (9th Cir. 1991) (where the district court gives two alternative grounds for enhancement, so long as one ground is proper, no remand is necessary).

F.2d 626, 633 (9th Cir. 1992) (district court need only make generalized statement of its reasons for enhancement, so appellate court may tie sentencing decision to a factual basis in the record).

B. Obstruction of Justice

[12] At the sentencing hearing, the district court applied a two-level adjustment to defendant Oliver's sentence concluding that he testified untruthfully at trial. After Oliver filed his notice of appeal, however, the district court issued a Sentencing Order in which it retracted the obstruction of justice enhancement for Oliver. The district court stated that Oliver's testimony at trial not rise to a level warranting enhancement. Although the district court determined that obstruction of justice was not applicable, it did not recalculate Oliver's sentence without the two-level adjustment. Oliver argues that in light of this discrepancy, his sentence should be remanded, and we agree.

The commentary to § 3C1.1 provides that "testimony and statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n. 1). We give great weight to the district court's assessment of Oliver's testimony. *See United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. 1990) (appellate court should give "due regard to the opportunity of the district court to judge the credibility of the witnesses"). Because the district court indicated that application of § 3C1.1 was not warranted, we remand this case for recalculation of defendant Oliver's sentence without the two-level adjustment.

C. Criminal History

Upon remand, the district court is also instructed to reconsider the appropriate Criminal History Category for Oliver. At sentencing, the district court adopted the presentence report finding that Oliver had nine criminal history points and a

Criminal History Category of IV. However, the district court's subsequent Sentencing Order suggested that Oliver had only six criminal history points, which would be a Criminal History Category of III. Although this discrepancy may have been nothing more than a clerical error, the district court should clarify the appropriate Criminal History Category and resulting sentence on remand.

D. Upward Departures

Finally, defendants argue that the district court erred in departing upward on their sentences. The district court relied on the presentence reports, which recommended an upward departure pursuant to U.S.S.G. § 2K2.4 to a total term of 360 months.[4] However, the probation department, and thus the district court, erred in applying § 2K2.4. Although defendants did not raise the issue before the district court, we address the issue to prevent a miscarriage of justice, and to ensure that defendants' do not serve sentences that exceed the guideline maximum. *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error doctrine permits the court to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings"); *see also United States v. Agoro*, 996 F.2d 1288, 1291 (1st Cir. 1993) (addressing unpreserved legal claim to prevent defendant from serving sentence exceeding guidelines).

[13] Pursuant to U.S.S.G. § 2B3.1(b)(2)(A), a 7-level enhancement would have normally been applicable to defendants' carjacking sentences because a gun was discharged during the offense. However, because defendants were also

[4]U.S.S.G. § 5K2.3, which provides for departure on the basis of "extreme psychological injury" to the victim, did not factor into the probation department's recommended 360-month sentences. The district court suggested that § 5K2.3 was an additional ground for departure, but did not attribute any specific amount of its departure to that basis. Because the district court adopted the presentence reports, it apparently believed that departure to 360 months was justified under § 2K2.4 alone.

convicted of using a firearm under § 924(c), which carries a mandatory consecutive five year sentence, defendants' carjacking sentences were not subject to the 7-level enhancement. *See* U.S.S.G. § 2K2.4, comment. (n. 2). U.S.S.G. § 2K2.4 provides for an upward departure in those cases where the guideline range for the underlying offense (without the seven-level enhancement), when combined with the mandatory five-year sentence under § 924(c), produces a total maximum penalty that is less than the maximum of the guideline range that would have been applicable if there was no conviction under § 924(c). The upward departure may not exceed "the maximum of the guideline range that would have resulted had there not been a count of conviction under [§ 924(c)]." *Id.*

[14] There is no dispute that defendants' guideline ranges would have been greater without a conviction under § 924(c). While upward departure was therefore appropriate, that departure could not exceed the maximum of the guideline range that would have been applicable without the § 924(c) conviction. In other words, the maximum combined penalty for the underlying carjacking conviction *plus* the § 924(c) conviction could not exceed the maximum penalty available for the carjacking conviction with the seven-level enhancement. For each defendant, the maximum guideline range absent their § 924(c) conviction (and with the 7-level enhancement) was limited to 300 months (25 years) — the statutory maximum penalty for carjacking resulting in serious bodily injury. *See* U.S.S.G. § 5G1.1 (providing that the guideline range is restricted by the statutorily authorized maximum penalty). Therefore, with an upward departure under § 2K2.4, the *total* sentence for each defendant could not exceed 300 months (or 240 months for the carjacking conviction plus consecutive 60 months for the § 924(c) conviction). That is the maximum penalty that would have been applicable "had there not been a count of conviction under § 924(c)." U.S.S.G. § 2K2.4, comment. (n. 2). Because the district court erred in applying

§ 2K2.4 to increase defendants' total sentences to 360 months, we vacate and remand for resentencing.

We express no opinion here as to whether, or to what extent, additional departure may be warranted under U.S.S.G. § 5K2.3. Should the district court attribute any amount of departure to § 5K2.3 on remand, it should specify why the psychological injury in this case is more severe than that which would normally occur to a victim of this type of crime. *See* U.S.S.G. § 5K2.3 (departure may be warranted if a victim "suffered psychological injury much more serious than that normally resulting from commission of the offense").

AFFIRMED in part, and VACATED and REMANDED in part.

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